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85-2145

Supreme Court, U.S.
FILED
MAY 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

THOMAS ANTHONY MARICLE,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the Search Warrant of February 20, 1985 was invalid in that it was not based on probable cause and did not meet the requirements for a Good Faith exception and, in addition, did not meet the requirement of Federal Rules of Criminal Procedure 41.

B. Whether the search of the mobile home on February 20, 1985 was illegal in that it exceeded the scope of the Search Warrant of February 20, 1985 which was in the possession of the police and it was admitted by the police that the Search Warrant of February 20, 1985 did not provide authority for searching the mobile home.

C. Whether the subsequent Search Warrant of February 21, 1985 was invalid in that a) it was the result of the prior warrantless search of the mobile home thereby making it "fruit of the poisonous tree," b) it was not based upon probable cause and did not meet the

requirements of Good Faith exception, and c) the Search Warrant exceeded the scope of the Affidavit presented for its issuance and, as such, was a General Warrant.

D. Whether the search conducted by the police in the execution of the February 21, 1985 Search Warrant was too broad and constituted a general search in violation of the Reasonable Clause of the Fourth Amendment.

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In The
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No. _____

THOMAS ANTHONY MARICLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner, THOMAS ANTHONY MARICLE, respectfully prays that a writ of certiorari issue to review the judgment of the United States

Court of Appeals for the Eleventh Circuit entered on March 19, 1986.

OPINIONS BELOW

The Court of Appeals entered its decision affirming the Petitioner's conviction on March 19, 1986. A copy of its decision is attached as Appendix A.

JURISDICTION

On March 19, 1986, the Court of Appeals entered a judgment affirming the conviction of the Petitioner [Appendix A]. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

PARTIES

There are no other parties to this matter with the exception of the Petitioner and the United States of America.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures, shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On March 19, 1986, a panel of the Eleventh Circuit Court of Appeals affirmed the conviction of Thomas Anthony Maricle for four (4) violations of 21 U.S.C. §841(a)(1) manufacture of phencyclidene, (b)(1) possession of phencyclidene with intent to distribute, (B), (d)(1)(a)1 possession of piperdine and (b)1 possession with intent to distribute marijuana (C) [Appendix A].

On February 19, 1985, two (2) juveniles were arrested for possession of cannabis in Volusia County, Florida. During an interrogation of the juveniles, the juveniles allegedly provided information concerning marijuana growing in a barn located on some premises allegedly burglarized by the juveniles on February 17, 1985. Based on the information provided by the juveniles, Agent Stevens, Deputy Bierman of the Volusia County Sheriff's Department and one of the juveniles went to the alleged burglarized premises on Fawn Trail in Volusia County, Florida to conduct surveillance of the property. This property was owned by the Petitioner, Thomas Anthony Maricle. In addition to owning the property, Maricle owned all of the structures contained on the premises.

During the surveillance, Agent Stevens

was able to see a barn, a mobile home which was the subject of the search, a U-Haul, a pick-up truck, a 1976 Chevy Nova and a black Volvo located on the premises. The barn and the mobile home were separate from one another.

Agent Stevens never obtained any license tag numbers and, as such, did not know if the vehicles belonged to the same person. He stayed in the area for only thirty (30) minutes and saw no one on the premises. He also saw no evidence that the vehicles were operable at the time of his observations and had received no information of more than one person being on the premises.

As he was leaving the property, he met two (2) women in a pick-up truck who inquired concerning his presence in the area. Upon further inquiry, these women told Agent

Stevens that only a man named Tom lived on the premises which he had surveilled.

Agent Stevens and the others returned to the Volusia County Sheriff's Department. Upon their arrival, Agent Stevens prepared a diagram of the area and presented that diagram to Investigator Jenkins.

Investigator Jenkins started to prepare an Affidavit for a Search Warrant for the barn on the premises. The juveniles had provided no information concerning guns being located in the mobile home. The agents also had no information that the individual, Tom, who occupied the premises, possessed guns nor did they have information concerning associates of his who might possess guns. During his surveillance, Agent Stevens did not see any indication of criminal activity on the premises. The only information provided by

the juveniles which could be corroborated by him was the location of the premises.

Interested in determining whether they had probable cause to search the mobile home located on the premises, the agents contacted an Assistant State Attorney for Volusia County. The Assistant State Attorney told the agents that there was not sufficient probable cause to obtain a search warrant for the mobile home and, as such, no attempt was made by the agents to obtain a search warrant for it.

Equipped with his own Affidavit and those of the juveniles, Investigator Jenkins obtained a Search Warrant dated February 20, 1985, which, as admitted by the agents during the suppression hearing, did not include authority to search the mobile home. A copy of said Search Warrant and the Affidavit to

support it are attached hereto as [Composite Appendix B].

Prior to the execution of the Search Warrant of February 20, 1985, a briefing was held for Drug Enforcement Agents, the SWAT team and Sheriff's Department personnel. During this briefing session, entry into the mobile home on the premises for purposes of a protective sweep search were discussed and decided upon.

No attempt was made by the agents to obtain a search warrant for the mobile home prior to the protective sweep. Both Investigator Jenkins and Agent Stevens candidly admitted during the suppression hearing that they had merely a suspicion that others were on the premises. In their minds, there was not a probability of other persons being on the premises. At the time, the only

information possessed by the agents concerning weapons was the possibility that there may be weapons in a shed which was located some distance from the mobile home. Also there was an uncorroborated story from the juveniles concerning an armed guard being on the premises. The agents admitted, however, that there were no concrete facts to establish that there were weapons in the mobile home at the time of the execution of the search warrant of February 20, 1985.

At approximately 3:00 P.M. on the 20th day of February, 1985, some nine (9) hours after the initial surveillance, the search warrant of February 20, 1985 was executed. In order to gain entry onto the premises which consisted of approximately ten (10) acres, the police cut the lock on the entrance gate to the premises. No attempt was made by the

police officers to announce their authority prior to cutting the lock on the gate.

Upon gaining entry, they approached and knocked on the front door of the mobile home. The Petitioner opened the door. Upon opening the door, the Petitioner was immediately placed on the ground outside and handcuffed. The police officers then swept through the premises and exited the mobile home. During the sweep in a back bedroom, they observed what they believed to be a clandestine laboratory. At the time, no chemicals were identified as precursor chemicals to an illegal chemical operation and, thus, there was no reason to believe there was criminal activity afoot. Based upon their observations in the mobile home, Investigator Jenkins applied for another search warrant on February 21, 1985 for the mobile home. A copy of said

Search Warrant and Affidavit in support of it are attached hereto as [Composite Appendix C].

The Search Warrant of February 21, 1985 was executed at approximately 5:00 P.M. on that date. The mobile home and its contents, including documents, were thoroughly searched. Documents were seized, removed and later examined at the police station. Many documents seized, such as love letters, were unrelated to the Search Warrant and did not show any criminal activity.

Maricle contested the search of the mobile home by way of a Motion to Suppress which was partially denied in the trial court. A panel of the Eleventh Circuit Court of Appeals affirmed the denial. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

A. The Search Warrant of February 20, 1985 was invalid in that it was not based on probable cause and did not meet the requirements for a Good Faith exception and, in addition, did not meet the requirement of Federal Rules of Criminal Procedure 41

With regard to the first question presented, the issue is whether the facts and circumstances taken as a whole gave the judge issuing the warrant probable cause to believe that the desired items would be found in the search. The Petitioner would submit that the decision of United States v. Leon, 468 U.S. _____, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984) is distinguishable from the instant case in that here, unlike Leon, there was no extensive investigation upon which Good Faith could be supported. In addition, the Petitioner would submit that even looking at the "totality of the circumstances" as

enunciated in Illinois v. Gates, 462 U.S. 213 (1983), the Affidavit failed to provide probable cause for the issuance of the Search Warrant due to the staleness of the juveniles' information.

B. The search of the mobile home on February 20, 1985 was illegal in that it exceeded the scope of the Search Warrant of February 20, 1985 did not provide authority for searching the mobile home

With regard to the second question, a conflict between the circuits has arisen concerning the circumstances under which a warrantless protective sweep search is authorized. In this case, the Eleventh Circuit Court of Appeals refused to find the warrantless protective sweep search of the mobile home of February 20, 1985 illegal. On almost identical facts in United States v. Kolodziej, 706 F.2d 590 (5th Cir. 1983), the

Fifth Circuit found a protective sweep search to be illegal. Other circuits on facts very close to the instant case have also found protective sweep searches to be illegal. See United States v. Basurto, 497 F.2d 781, (9th Cir. 1974); United States v. Gamble, 473 F.2d 1274 (7th Cir. 1973); United States v. Flinkinger, 573 F.2d 1349 (9th Cir. 1978); United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982); United States v. Duggar, 603 F.2d 97 (9th Cir. 1979); United States v. Spetz, 721 F.2d 1457 (9th Cir. 1983). In the instant case, there were no facts establishing probable cause to support the agents' belief that the mobile home or anyone therein posed a danger to the officers, nor that there was anyone other than the Petitioner on the premises.

Review should also be granted in that the

police officers themselves created the exigent circumstances relied on in the instant case by failing to obtain a search warrant in the more than nine (9) hours prior to their entry into the mobile home on February 20, 1985. Police may not deliberately create exigent circumstances in order to subvert the warrant requirements of the Fourth Amendment. United States v. Thompson, 700 F.2d 944 (5th Cir. 1983), United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974). An individual's right to be free from a warrantless search and seizure in his home is the primary issue involved in the second question.

C. The subsequent Search Warrant of February 21, 1985 was invalid in that a) it was the result of the prior warrantless search of the mobile home thereby making it "fruit of the poisonous tree," b) it was not based upon probable cause and did not meet the requirements of the Good Faith exception,

c) the Search Warrant exceeded the scope of the Affidavit presented for its issuance and, as such, was a General Warrant

With respect to the third question, the Petitioner contests the probable cause for the issuance of the second Search Warrant on February 21, 1985, especially in light of the illegal warrantless protective sweep of the mobile home. The Petitioner would also contend that even assuming the protective sweep search was authorized, the Affidavit in support of the Search Warrant failed to establish probable cause for its issuance in that there was no indication of criminal activity justifying a finding of probable cause. See United States v. Tate, 694 F.2d 1217 (9th Cir. 1982, United States v. Tasto, 586 F.2d 1068 (5th Cir. 1978). There must exist a nexus between the items to be seized and criminal behavior. See Warden v. Hayden,

387 U.S. 294. Here no such nexus existed to support a belief that criminal activity was taking place in the mobile home. At best, innocuous chemistry equipment was observed. There was no showing that any chemicals associated with criminal activity were present.

The instant case provides a factual scenario significant different than the scenario in United States v. Leon, 468 U.S. 82 L.Ed. 2d 677, 104 S.Ct. 3405 (1984). In the instant case, unlike Leon, police failed to conduct an extensive investigation focusing on the residence where the alleged criminal activity was supposedly taking place, thereby negating objective Good Faith.

D. The search conducted by the police in the execution of the February 21, 1985 Search Warrant was too broad and constituted a general

search in violation of the Reasonable Clause of the Fourth Amendment

With respect to the fourth question, Petitioner would submit that the execution of the Search Warrant of February 21, 1985 at the mobile home was an abhorred general search and in flagrant disregard for the limitations in the warrant. The police undertook exploratory rummaging of such an aggregious nature that all of the evidence seized from the mobile home should be suppressed. See United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982).

CONCLUSION

For the foregoing reasons, the Petitioner, Thomas Anthony Maricle, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

STUART I. HYMAN
NeJame & Hyman, P.A.
1520 East Amelia Street
Orlando, Florida 32803
(305)896-0536

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the Bar of this Court and that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court, I this day served three (3) copies of the foregoing Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit on counsel for the Respondent by enclosing a copy thereof in an envelope, First Class, postage prepaid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Office of the United States Attorney
80 North Hughey Street
Orlando, Florida 32801

and depositing same in the United States Mail at Orlando, Florida on 26th day of June, 1986.

Stuart I. Hyman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the Bar of this Court and that pursuant to Rules 29.3 and 25.5(a) of the Rules of the Supreme Court, I this day served three (3) copies of this foregoing petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit on counsel for the Respondent by enclosing a copy thereof in an envelope, first-class postage prepaid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and depositing same in the United States Mail at Orlando, Florida on _____ day of June, 1986.

Stuart I. Eyman

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-3671

D.C. Docket No. 85-19

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS ATHONY MARICLE,

Defendant-Appellant.

Appeal from the United States

District Court for the Middle

District of Florida

(March 19, 1986)

Before RONEY and FAY, Circuit Judges, and SIMPSON, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

Judgment Entered: March 19, 1986

For the Clerk; Spencer D. Mercer, Clerk

By: /s/ Deputy Clerk

ISSUED AS MANDATE:

COMPOSITE APPENDIX B

SEARCH WARRANT

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA,

IN THE NAME OF THE STATE OF FLORIDA

TO: Sheriff Edwin H. Duff, II, Sheriff of Volusia County Florida, and/or any lawful Deputy Sheriff of Volusia County, and Agents of the Drug Enforcement Administration,

WHEREAS, complaint on oath and in writing, supported by affidavit, having been made this day before the undersigned, S. James Foxman, Circuit Judge,

AND WHEREAS, said facts made known to me have caused me to certify and find that there is probable cause to believe that certain laws have been and are being violated in or on certain premises and the curtilage therefore, in Volusia County, Florida, being known and described as follows: A wood barn, red in

color that has a shiny metal roof. The property also has several other wood and metal smaller buildings situated around the main building, being the barn. The property to be searched can be located by heading east on Maytown Road (a paved highway), from the township of Osteen, Volusia County, Florida taking this easterly direction until you arrive at the intersection of Maytown Road and Deer Run Road. Deer Run Road is a dirt roadway, clearly marked with a County street sign. Taking a left hand turn from Maytown onto Deer Run, following this winding road for approximately one mile (this roadway during its winding course, apparently changes names from Deer Run Road to Fawn Trail), you will arrive at a metal cattle type gate, silver in color, with a chain and lock. Directly across the roadway from the metal gate, is a

residence which has a wooden sign nailed to a tree approximately five (5) feet from the roadway, which has an address of 385 Fawn Trail painted on it. Located down the driveway approximately 130 yards beyond the metal gate, is a mobile home about 60 x 14, white in color, grey trim. The aforedescribed barn is located about 30 yds., to the rear of the trailer. The property to be searched does not have a mailbox nor does it have any signs or markings to indicate any address and being the premises of TOM (Last name unknown) and there is now being kept in or on said premises and curtilage certain controlled substances to wit: Cannabis. Cannabis being a controlled substance as defined in Section 893 et al Florida Statute which is being kept and used in violation of the laws of the State of Florida, to-wit: the laws prohibiting the

unlawful possession of cannabis, a controlled substance as defined in Section 893.13 Florida Statutes.

AND WHEREAS, the facts establishing the grounds for this application are set forth in the affidavit of which affidavit is made a parte [sic] of this search warrant, by reference. Search warrant Affidavit consisting of 3 pages Attached to and made a part of this Search Warrant by reference.

NOW THEREFORE, you or either of you, with such lawful assistance as may be necessary, are hereby commanded, in the daytime or in the nighttime, or on Sunday, to enter and search the aforesaid premises together with the yard and curtilage thereof, for this property described in this warrant, and if the same or any part thereof be found, you are hereby authorized to seize and secure same, giving

proper receipt therefor and delivering a completed copy of this warrant to the person in charge of the premises, or in the absence of any such person, leaving a completed copy where the property is found, and making a return of your doings under this warrant within ten (10) days of the date hereof, and you are further directed to bring said property so found and also the bodies of the person or persons in possession thereof before the Court having jurisdiction of this offense to be disposed of according to law.

WITNESS my hand and seal this 20th day of February, 1985.

/s/ S.J. Foxman

Circuit Judge

AFFIDAVIT

For Search Warrant

IN THE Circuit Court of the Seventh Judicial Circuit IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA)

COUNTY OF VOLUSIA)

BEFORE ME, /s/ James Foxman, Circuit Judge, in and for Volusia County, Florida, personally came who being first duly sworn, deposes and says: That Affiant has reason to believe that those certain premises located in Volusia County, Florida, described as follows, to-wit: See Exhibit A, attached hereto, made a part hereof and incorporated by reference, being the premises occupied by or under the control of TOM (Last name unknown) and there is now being kept on said premises certain controlled substances to-wit: Cannabis. Cannabis being a controlled substance as defined in Section 893

et al Florida Statute, which is being kept and used in violation of the Laws of the State of Florida, to-wit: the Laws prohibiting the unlawful possession of cannabis, a controlled substance as defined in Section 893.13 Florida Statutes. That the facts tending to establish the grounds for this application and the probable cause of affiant believing that such facts exists are as follows:

Your affiant, Investigator Jenkins, a Deputy Sheriff employed by the Volusia County Sheriff's Department, and has been so employed for five years. He has been assigned exclusively to the Criminal Investigation Division for four of those years. He is currently assigned to the Drug Investigation Unit, and so assigned for the past three years. Your Affiant estimates that he has personally investigated several hundred

criminal cases of all types, including numerous narcotics cases.

Your Affiant has received the following training in investigative techniques. At St. Augustine Technical Institute he received training in Basic Police Standards, and at numerous other locations, several training seminars. He holds numerous certificates of completion in training, including Interview and Interrogation, D.E.A. Basic Course, and others.

On 01/09/85 at approximately 2200 hours, your Affiant and members of the Volusia County Sheriff's Department, Criminal Investigation Division, initiated a narcotics investigation into the circumstances surrounding the arrest of Matthew William Kunzig and Richard Lee Brasier, Jr. Both of

the aforementioned subjects were arrested by Deputy Susan Walker (Volusia County Patrol Division) for possession with intent to distribute marijuana. Found in the possession of both subjects were 23 baggies of green leafy material (exact weight unknown) which was tested (NIK Test Kit) by Cpl. E. Harris, Volusia County S. O. and produced positive results for marijuana.

During the booking procedures at the DeLand County Jail it was determined that both of the aforementioned subjects had displayed an interest in assisting the Volusia County Sheriff's Department in the possible location of a narcotics stash house in the Osteen, Florida area. This information was relayed to Inv. Jenkins by Deputy Susan Walker (via telephone).

Inv. Jenkins and Sgt. Burnsed responded to

the Volusia County Jail in DeLand, Florida and after the subjects had been booked, Inv. Jenkins again advised the subjects of their constitutional rights. Inv. Jenkins and Sgt. Burnsed then interviewed both subjects (separately) and determined that on 02/17/85 around 2330 hours, both Kunzig and Brasier burglarized a trailer, a shed and a barn at the location described herein. During the burglary of the barn, Kunzig and Brasier took into their possession the aforementioned amount of marijuana (confiscated by Deputy Walker), leaving an undetermined amount of plants behind. Both Kunzig and Brasier advised that the plants were being grown under sun lamps and were being watered by some type of automatic watering device. After leaving the barn, Kunzig and Brasier then entered the aforementioned shed where they observed

"machine guns" laying all over the place. They also advised that there were numerous magazines for the machine guns in the same area as the weapons.

Brasier described the weapons as automatic M/16 Rifles.

Both Brasier and Kunzig provided sworn statements which are attached to and made a part of this affidavit.

At approximately 0730 hours, 02/20/85, Inv. Bowman and Agent Stevens conducted a visual check of the aforementioned property. A call to a confidential source by Capt. E. L. Carroll revealed that they knew the property owner as Tom, last name unknown, that he is a salesman, that he drives a Volvo or a Mercedes and only comes to the property sporadically.

WHEREFORE, affiant makes this affidavit

and prays the Issuance of a search warrant in due form of law for the search of the above described premises for the said property, heretofore described, and for the seizure and safe keeping thereof, subject to the order of a Court having jurisdiction thereof, by the duly constituted officers of the law.

/s/ Steven Jenkins

Sworn to and subscribed before me this 20th day of February, 1985.

/s/ S. J. Foxman

Circuit Judge

EXHIBIT A

A wood barn, red in color that has a shiny metal roof. The property also has several other wood and metal smaller buildings situated around the building, being the barn.

The property to be searched can be located by heading east on Maytown Road (a paved highway), from the township of Osteen, Volusia County Florida.

Taking this easterly direction until you arrive at the intersection of Maytown Road and Deer Run Road. Deer Run Road is a dirt roadway, clearly marked with a County street sign. Taking a left hand turn from Maytown onto Deer Run Road, following this winding road for approximately one mile (this roadway during its winding course, apparently changes names from Deer Run Road to Fawn Trail), you will arrive at a metal type gate, silver in

color, that is secured with a chain and lock. Directly accross the roadway from a metal gate is a residence which has a wooden sign nailed to a tree approximately five (5) feet from roadway, which has an address of 385 Pawn Trail painted on it. Located down a driveway approximately 130 yds., is a mobile home about 60 x 14, white in color, grey trim. The aforedescribed barn is located about 30 yds., to the rear of the trailer.

The property to be searched does not have a mailbox not does it have any signs or markings to indicate any address.

/s/ Steven Jenkins

/s/ S. J. Foxman

Circuit Judge

STATEMENT

TAKEN AT Volusia County Sheriff's Department

DATE 0-2-20-85 [sic] TIME 1:05 A.M.

I, Matthew W. Kunzig, having been warned of my constitutional rights and knowing that I do not have to make any statement at this time, do hereby, freely and voluntarily make the following statement to Deputy S. Jenkins who has properly identified himself to me to be a Deputy Sheriff of Volusia County, Florida, knowing full well that this statement, or any portion thereof, may be used against me, or any other person at any time, in any court, trial or issue. I further state that I have been subjected to no threats or duress, and have received no promise of reward or immunity.

My name is /s/ Matt Kunzig, 16 years of

age. I was born Aug. 12, 1968. I live at 1170 Sixma Road. The first time I went into the house was about a week ago. When I got there my friend and I walked up the driveway [sic] by the time we got up to the yard you could smell ethyl it was strong and got worse as we got closer to the trailer. When we got to the trailer we look in all the windows. The t.v. was on all the lights were on and you could hear a big fan in the trailer like an air conditioner. Then we went in the window after we opened it. Then we opened the front door I got a shotgun off of the bed it was loaded all the way then I took the safety off and stood at the door a [sic] watched to see if anybody was coming while my friend (Steve Chapman) looked around. Then we took the gun and ran down the driveway to our truck and then we left. The next time I came back it

was me and Richard. We parked his car and then walked down the driveway we got halfway down the driveway we could smell ethyl again when we got to the trailer the same lights were on and the door was shut and locked and the t.v. was off. So we went up to the trailer and looked in all the windows and then we knocked on the door to see if anybody was home, nobody answered. So we went up to the barn and crawled under the door to get to the marijuana plants when we got inside we striped [sic] the plants and put them in a bag when we were done Richard crawled back under the door then I handed the bag to him and then I crawled back under then we went to the shed we opened it and there was about 8 cases with machine guns laying all over them some were leaning up against the sides. So then we closed the doors and went up to the trailer

then we opened the same window as before and Richard went in and then opened the front door and then I went in the trailer, I went into the bathroom while Richard kicked in the door they had little padlocks on them. I was in the bathroom and there was a bathroom that was filled with something that smelled like ethyl. Then I walked out of there and went into the next room that Richard had kicked the door down it was what looked like a laboratory it had tubes running from the bathtub to glass jars that were on stands with burners under them, they had funnels in them. There were jars around with purple and red liquid in them. Then there was a bag on the ground with white crystals in it with big rocks. So them we grabbed it and a flask with some white pebbles in it, it smelled real strong like ethyl. Then we checked the kichen [sic] and

then we went back into the bedroom and got some .22 shells and some other shells. And we got 2 scopes for guns. Then we grabbed all our stuff and ran down the driveway to our car and went home.

I do hereby certify that I have read the preceding statement and that it is the truth, and the whole truth, to the best of my knowledge and belief.

/s/ Matt Kunzig

Subscribed before me this 20th day of February, 1985.

/s/ Edward Bowman

STATEMENT

TAKEN AT Voulia [sic] County Sheriff's Dept. DATE 02-20-85 TIME1:05 A.M.

I, Richard Lee Brasier, having been warned of my constitutional rights and knowing that I do not have to make any statement at this time do hereby, freely and voluntarily make the following statement to Deputy S. Jenkins who has properly identified himself to me to be a Deputy Sheriff of Volusia County, Florida, knowing full well that this statement, or any portion thereof, may be used against me, or any other person at any time, in any court, trial or issue. I further state that I have been subjected to no threats or duress, and have received no promise of reward or immunity.

My name is Richard Lee Brasier, 7-21-67 years of age. I was born DeLand, Florida West

Voulisa [sic]. I live at 1150 1st Deland, Fl. I learn about the place about last weekend Steve told me about geting [sic] some weed so than [sic] Sunday me and Matt went to the palce[sic] and broken [sic] in and I smelled ethyl in the house and barn. The barn had plant's [sic] growing with lights om [sic] them and we start to pick [sic] them the plant's [sic] and then we broke into the house and I broke the with [sic] lock's [sic] on it and sool [sic] a lot glass bottle's [sic] and a tub of ethyl and I grab [sic] a bag with powder and then we left house [sic] and went home. The house had all the light's [sic] on t.v. was on and ther [sic] was one car and ther [sic] was fan going but it wasts [sic] cold in house and in shied [sic] ther [sic] was case of gun's [sic] that ther [sic] were laying around and some clip's [sic].

/s/ Richard Brasier

Subscribed before me this 20th day of February, 1985 at CID-Highway 92- Daytona Beach, Florida.

/s/ Edward Bowman

COMPOSITE APPENDIX C

SEARCH WARRANT

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA)

COUNTY OF VOLUSIA)

IN THE NAME OF THE STATE OF FLORIDA:

TO: Sheriff Edwin H. Duff, II, Sheriff of Volusia County, Florida, and/or any lawful Deputy Sheriff of Volusia County, and Agents of the Drug Enforcement Administration.

WHEREAS, complaint on oath and in writing, supported by affaidavit [sic], having been made this day before the undersigned, Robert P. Miller, Circuit Judge and attached affidavits of Ben Johnson and Deputy Ellinor,

AND WHEREAS, said facts made known to me have caused me to certify and find that there is probable cause to believe that certain laws have been and are being violated in or on

certain premises and the curtilage therefore, in Volusia County, Florida being known and described as follows:

A mobile home about 60 x 14, white in color, grey trim, located down the driveway approximately 130 yards, beyond the metal gate. A wood barn, red in color that has a shiny metal roof. The property also has several other wood and metal smaller building situated around the main building, being the barn.

The property to be search [sic] can be located by heading east on Maytown Road (a paved highway) from the township of Osteen, Volusia County, Florida.

Taking this easterly direction until you arrive at the intersection of Maytown Road and Deer Run Road. Deer Run Road is a dirt roadway, clearly marked with a County street

sign. Taking a left hand turn from Maytown onto Deer Run. Following this winding road for approximately one mile (this roadway during its winding course, apparently changes names from Deer Run Road to Fawn Trail), you will arrive at a metal cattle type gate, silver in color, that is secured with a chain and lock. Directly across the roadway from the metal gate, is a residence which has a wooden signe [sic] nailed to a tree approximately five (5) feet from roadway, which has an address of 385 Fawn Trail painted on it. Located down the driveway approximately 130 yds., beyond the metal gate, the aforementioned mobile home about 60 x 14, white in color, grey trim. The aforedescribed barn is located about 30 yards to the rear of the trailer.

The property to be searched does not have

any signs or markings to indicate any address. and being the premises of TOM (last name unknown) and there is now being kept in or on said premises and curtilage certain controlled substances to-wit: Phencylidine or cocaine, which is being kept and used in violation of the laws of the State of Florida to-wit: the unlawful possession of Cannabis, a controlled substance as defined in Section 893.13 Florida Statutes.

AND WHEREAS, the facts establishing the grounds for this application are set forth in the affidavits and made a parte [sic] of this search warrant, by reference.

Search Warrant Affidavits consisting of 7 pages attached to and made part of this Search Warrant be reference.

NOW, THEREFORE, you or either of you, with such lawful assistance as may be necessary,

are hereby commanded in the daytime or in the nighttime, or on Sunday, to enter and search the aforesaid premises together with the yard and curtilage thereof, for the property described in this warrant, and if the same or any part thereof can be found, you are hereby authorized to seize and secure same, giving proper receipt therefor and delivering a completed copy of this warrant to the person in charge of the premises, or in the absence of any such person, leaving a completed copy where the property is found and making a return of your doings under this warrant within ten (10) days of the date hereof, and you are further directed to bring said property so found and also the bodies of the person or persons in possession thereof before the court having jurisdiction of this offense to be disposed of according to law.

WITNESS my hand and seal this 21st day of February, 1985.

/s/ Robert P. Miller

Circuit Judge

AFFIDAVIT

FOR SEARCH WARRANT

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA)

COUNTY OF VOLUSIA)

BEFORE ME, Robert P. Miller, CIRCUIT JUDGE in and for Volusia County, Florida personally came Steven L. Jenkins, who being first duly sworn, deposes and says: That Affiant has reason to believe that those certain premises located in Volusia County, Florida described as follows, to-wit:

A mobile home about 60 x 14, white in color, grey trim, located down the driveway approximately 130 yards, beyond the metal gate. A wood barn, red in color that has a shiny metal roof. The property also has several other wood and smaller buildings

situated around the main building, being the barn.

The property to be search [sic] can be located by heading east on Maytown Road (a paved highway), from the township of Osteen, Volusia County, Florida.

Taking this easterly direction until you arrive at the intersection of Maytown Road and Deer Run Road. Deer Run Road is a dirt roadway, clearly marked with a County street sign. Taking a left hand turn from Maytown onto Deer Run. Following this winding road for approximately one mile (this roadway during its winding course, apparently changes names from Deer Run Road to Fawn Trail), you will arrive at a metal cattle type gate, silver in color, that is secured with a chain and lock. Directly across the roadway from the metal gate, is a residence which has a

wooden signe [sic] nailed to a tree approximately five (5) feet from roadway, which has an address of 385 Fawn Trail painted on it. Located down the driveway approximately 130 yards, beyond the metal gate, the aforementioned mobile home about 60 x 14, white in color, grey trim. The aforedescribed barn is located about 130 yards, to the rear of the trailer.

The property to be searched does not have a mailbox nor does it have any signs or markings to indicate any address and being the premises occupied by or under the control of TOM (last name unknown) and there is now being kept on said premises certain controlled substances, to-wit: Cannabis. Cannabis being a controlled substance as defined in Section 893 et al Florida Statutes,

which is being kept and used in violation

of the laws of the State of Florida, to-wit: the Laws prohibiting the unlawful possession of Cannabis, a controlled substance as defined in Section 893.13, Florida Statutes.

That the facts tending to establish the grounds for this application and the probable cause of affiant believing that such facts exists are as follows:

Your Affiant, Investigator Jenkins, a Deputy Sheriff employed by the Volusia County Sheriff's Department, and has been so employed for five years. He has been assigned exclusively to the Criminal Investigation Division for four of those years. He is currently assigned to the Drug Investigation Unit, and so assigned for the past three years. Your Affiant estimates that he has personally investigated several hundred criminal cases of all types, including

numerous narcotics cases.

Your Affiant has received the following training in investigative techniques:

At St. Augustine Technical Institute he received training in Basic Police Standards, and at numerous other locations, several training seminars. He holds numerous certificates of completion in training, including Interview and Interrogation, D.E.A. Basic Course, and others.

On 02/19/85 at approximately 2200 hours, your Affiant and members of the Volusia County Sheriff's Department, Criminal Investigation Division, initiated a narcotics investigation into the circumstances surrounding the arrest of Matthew William Kunzig and Richard Lee Brasier, Jr. Both of the aforementioned subjects were arrested by Deputy Susan Walker (Volusia County Patrol Division) for

possession with intent to distribute marijuana. Found in the possession of both subjects were 23 baggies of green leafy material (exact weight unknown) which was tested (NIK Test Kit) by Cpl. E. Harris, Volusia County S.O. and produced positive results for marijuana.

During the booking procedures at the DeLand County Jail it was determined that both of the aforementioned subjects had displayed an interest in assisting the Volusia County Sheriff's Department in the possible location of a narcotics stash house in the Osteen, Florida area. This information was relayed to Inv. Jenkins by Deputy Susan Walker (via telephone).

Inv. Jenkins and Sgt. Burnsed responded to the Volusia County Jail in DeLand, Florida, and after the subjects had been booked, Inv.

Jenkins again advised the subjects of their Constitutional Rights. Inv. Jenkins and Sgt. Burnsed then interviewed both subjects (separately) and determined that on 02/17/85 around 2330 hours, both Kunzig and Brasier burglarized a trailer, a shed and a barn at the location described herein. During the burglary of the barn, Kunzig and Brasier took into their possession the aforementioned amount of marijuana (confiscated by Deputy Susan Walker) leaving an undetermined amount of plants behind. Both Kunzig and Brasier advised that the plants were being grown under sun lamps and were being watered by some type of watering device. After leaving the barn, Kunzig and Brasier then entered the aforementioned shed where they observed several of what they referred to as "machine guns" laying all over the place. They also

advised there were numerous magazines for the machine guns in the same area as the weapons.

Brasier described the weapons as automatic M/16 rifles.

Both Brasier and Kunzig provided sworn statements which are attached to and made a part of this affidavit.

At approximately 0730 hours, 02/20/85, Inv. Bowman and Agent Jenkins conducted a visual check of the aforementioned property. A call to a confidential source by Capt. E.L. Carroll revealed that they knew the property owner as Tom, last name unknown, that he is a salesman, that he drives a Volvo or a Mercedes and only comes to the property sporadically.

On 02/20/85 around 1531 hours, during the lawful execution of the attached Search Warrant, S.W.A.T. Officers Deputy J. Ellinor and Lt. B. Johnson entered the aforementioned

trailer (residence) in order to secure any persons inside and prevent any harm from coming to police officers approaching the property. During said entry, Deputy Ellinor took into his possession a fully loaded Browning .380 automatic handgun (Serial No. 06227), which was located less than eight feet fromf [sic] the front entrance of said trailer. An unidentified white male had answered the door and was apprehended on the spot by S.W.A.T. Officers and detained for the Drug Enforcement Administration. The unidentified white male was immediately asked whether or not there were other people inside the trailer, but refused to answer. The aforementioned S.W.A.T. Officers continued the securing of the trailer and during same, noticed what was believed to be a clandestine lab located in the bathroom and appeared to be

in operation at the time. The odor of ether was very strong throughout the entire trailer, but got stronger as you approached the area of the bathroom. Also there were numerous containers of miscellaneous chemicals under a bench in one of the bedrooms. The S.W.A.T. Officers backed out of the trailer and the entire area was secured and roped off. D.E.A. Agent Frank Chisari was on location and advised that ether is indicative of clandestine labs and normally used in the manufacturing of cocaine. Chisari also noted that ether is very volatile. The aforementioned white male was then identified as: THOMAS MARICLE.

Your Affiant prays that a Search Warant be issued for the aforementioned trailer (residence) and the following items considered for confiscation:

The lab apparatus.

All chemicals and/or agents.

Any and all controlled substances including but not limited to Phencyclidine and/or cocaine.

Documents, records, notes and nay [sic] memoranda related to said lab.

WHEREFORE, affiant makes this affidavit and prays the issuance of a search warrant in due form of law for the search of the above described premises for the said property, heretofore described, and for the seizure and safe keeping thereof, subject to the order of a Court having jurisdiction thereof, by the duly constituted officers of the law.

/s/ Steven L. Jenkins

Sworn to and subscribed before me this 21st day of February, 1985.

/s/ Robert P. Miller

CIRCUIT JUDGE

STATEMENT

TAKEN AT Voulia [sic] County Sheriff's Dept. DATE 02-20-85 TIME1:05 A.M.

I, Richard Lee Brasier, having been warned of my constitutional rights and knowing that I do not have to make any statement at this time do hereby, freely and voluntarily make the following statement to Deputy S. Jenkins who has properly identified himself to me to be a Deputy Sheriff of Volusia County, Florida, knowing full well that this statement, or any portion thereof, may be used against me, or any other person at any time, in any court, trial or issue. I further state that I have been subjected to no threats or duress, and have received no promise of reward or immunity.

My name is Richard Lee Brasier, 7-21-67 years of age. I was born DeLand, Florida West

Voulisa [sic]. I live at 1150 1st Deland, Fl. I learn about the place about last weekend Steve told me about geting [sic] some weed so than [sic] Sunday me and Matt went tot the palce[sic] and broken [sic] in and I smelled ethyl in the house and barn. The barn had plant's [sic] growing with lights om [sic] them and we start to pick [sic] them the plant's [sic] and then we broke into the house and I broke the with [sic] lock's [sic] on it and sool [sic] a lot glass bottle's [sic] and a tub of ethyl and I grab [sic] a bag with powder and then we left house [sic] and went home. The house had all the light's [sic] on t.v. was on and ther [sic] was one car and ther [sic] was fan going but it wasts [sic] cold in house and in shied [sic] ther [sic] was case of gun's [sic] that ther [sic] were laying around and some clip's [sic].

/s/ Richard Brasier

Subscribed before me this 20th day of February, 1985 at CID-Highway 92- Daytona Beach, Florida.

/s/ Edward Bowman

STATEMENT

TAKEN AT Volusia County Sheriff's Department

DATE 0-2-20-85 [sic] TIME 1:05 A.M.

I, Matthew W. Kunzig, having been warned of my constitutional rights and knowing that I do not have to make any statement at this time, do hereby, freely and voluntarily make the following statement to Deputy S. Jenkins who has properly identified himself to me to be a Deputy Sheriff of Volusia County, Florida, knowing full well that this statement, or any portion thereof, may be used against me, or any other person at any time, in any court, trial or issue. I further state that I have been subjected to no threats or duress, and have received no promise of reward or immunity.

My name is /s/ Matt Kunzig, 16 years of

age. I was born Aug. 12, 1968. I live at 1170 Sixma Road. The first time I went into the house was about a week ago. When I got there my friend and I walked up the driveway [sic] by the time we got up to the yard you could smell ethyl it was strong and got worse as we got closer to the trailer. When we got to the trailer we look in all the windows. The t.v. was on all the lights were on and you could hear a big fan in the trailer like an air conditioner. Then we went in the window after we opened it. Then we opened the front door I got a shotgun off of the bed it was loaded all the way then I took the safety off and stood at the door a [sic] watched to see if anybody was coming while my friend (Steve Chapman) looked around. Then we took the gun and ran down the driveway to our truck and then we left. The next time I came back it

was me and Richard. We parked his car and then walked down the driveway we got halfway down the driveway we could smell ethyl again when we got to the trailer the same lights were on and the door was shut and locked and the t.v. was off. So we went up to the trailer and looked in all the windows and then we knocked on the door to see if anybody was home, nobody answered. So we went up to the barn and crawled under the door to get to the marijuana plants when we got inside we striped [sic] the plants and put them in a bag when we were done Richard crawled back under the door then I handed the bag to him and then I crawled back under then we went to the shed we opened it and there was about 8 cases with machine guns laying all over them some were leaning up against the sides. So then we closed the doors and went up to the trailer

then we opened the same window as before and Richard went in and then opened the front door and then I went in the trailer, I went into the bathroom while Richard kicked in the door they had little padlocks on them. I was in the bathroom and there was a bathroom that was filled with something that smelled like ethyl. Then I walked out of there and went into the next room that Richard had kicked the door down it was what looked like a laboratory it had tubes running from the bathtub to glass jars that were on stands with burners under them, they had funnels in them. There were jars around with purple and red liquid in them. Then there was a bag on the ground with white crystals in it with big rocks. So them we grabbed it and a flask with some white pebbles in it, it smelled real strong like ethyl. Then we checked the kichen [sic] and

then we went back into the bedroom and got some .22 shells and some other shells. And we got 2 scopes for guns. Then we grabbed all our stuff and ran down the driveway to our car and went home.

I do hereby certify that I have read the preceding statement and that it is the truth, and the whole truth, to the best of my knowledge and belief.

/s/ Matt Kunzig

Subscribed before me this 20th day of February, 1985.

/s/ Edward Bowman

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2145

In the Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS ANTHONY MARICLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2145

THOMAS ANTHONY MARICLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the validity of two search warrants and the execution of the searches authorized by those warrants.

1. Petitioner was indicted in the United States District Court for the Middle District of Florida and charged with possessing and manufacturing phencyclidine (PCP), possessing piperidine with intent to manufacture phencyclidine, and possessing marijuana with intent to distribute it, all in violation of 21 U.S.C. (& Supp. II) 841. Following the partial denial of his motion to suppress evidence, petitioner pleaded guilty to all four counts in the indictment, reserving the right to appeal the district court's suppression ruling. He was sentenced to a total of 11 years' imprisonment.

On February 19, 1985, local sheriffs arrested two juveniles for possession of marijuana. In sworn statements, the juveniles informed the authorities that they had stolen the marijuana from a barn in Osteen, Florida, where they had observed marijuana plants growing under sun lamps. The juveniles also stated that they had seen machine guns and ammunition in a shed adjoining the barn, and had observed more guns, ammunition, and a laboratory in a mobile home nearby. In addition, the juveniles informed the officers that they had seen several people on the property on other occasions, and were aware that an armed guard had been hired to protect the property. 1 Tr. 134-135; Pet. App. B15-B22. The next morning, an agent of the Drug Enforcement Administration (DEA) accompanied the juveniles to the Osteen property and confirmed their description of the layout, noting three vehicles nearby (1 Tr. 35-39).

Later on February 20, a state judge issued a warrant authorizing a search for marijuana in the Osteen barn and adjoining smaller buildings (Pet. App. B1-B5). Because they had been informed that several persons and a substantial quantity of arms might be in the area, the officers executing the warrant determined to make a protective sweep of the property. As the agents approached the mobile home, they detected a strong smell of ether; they accordingly entered the trailer, where they found petitioner and an operational laboratory. With petitioner's help, the agents shut down the laboratory to prevent an explosion. Agents subsequently reentered the mobile home to shut off its electricity and to ventilate it. 1 Tr. 146-147, 222-225.

The following day, law enforcement agents obtained a warrant to search the mobile home for phencyclidine and cocaine (Pet. App. C1-C6). The warrant affidavit incorporated the statements of the juvenile informants, set forth the observations of the officers who had entered the trailer on February 20, and noted that the presence of ether was

indicative of cocaine manufacture (*id.* at C7-C26). A search of the mobile home revealed laboratory glassware, chemistry books, chemistry notes, and phencyclidine (1 Tr. 93-103).

The district court subsequently denied petitioner's motion to suppress the evidence found in the barn and mobile home.[1] The court concluded that the protective sweep was justified both to ascertain whether any persons were present in the area and to forestall an explosion of the ether. The court also held that the warrants were supported by probable cause. 2 Tr. 65-67. The court of appeals affirmed without opinion (Pet. App. A1-A2).

2. Petitioner's fact-bound contentions that the February 20 warrant lacked probable cause (Pet. 13) and that the protective sweep undertaken by law enforcement agents was unjustified (*id.* at 13-14) are without merit and do not warrant this Court's consideration. The affidavit supporting the February 20 warrant contained ample support for the conclusion that a search would reveal evidence of a crime: the two juveniles reported seeing marijuana, a laboratory, guns, and ammunition. Their accounts, moreover, were corroborated by their possession of a large quantity of marijuana, as well as by the DEA agent's observations on the scene. Cf. *Illinois* v. *Gates*, 462 U.S. 213 (1983).

On the record here, the agents' protective sweep similarly was justified. The juveniles had seen machine guns and ammunition in the shed and mobile home, they had seen

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[1]The court granted petitioner's motion to suppress evidence obtained during warrantless searches of an automobile and U-Haul trailer located nearby (2 Tr. 29-30).

[2]Petitioner's discussion (Pet. 12) of the good faith exception to the warrant requirement is beside the point, because the warrants here were issued on probable cause.

more than one person on the property, and they had knowledge that a security guard had been stationed in the area. On the morning of the search, a DEA agent had seen three vehicles on the property, indicating that there might be several people nearby. And the agents had smelled ether, an explosive gas, emanating from the mobile home. The district court therefore properly concluded that the protective sweep was a reasonable response to dangers faced by agents executing the warrant.

Petitioner also is incorrect in asserting (Pet. 13-14) a conflict in the circuits on this point. While courts have held protective sweeps improper in the absence of any indication that potentially dangerous people were in the area (see, *e.g.*, *United States* v. *Hatcher*, 680 F.2d 438, 444 (6th Cir. 1982); *United States* v. *Gamble*, 473 F.2d 1274, 1277 (7th Cir. 1973); *United States* v. *Spetz*, 721 F.2d 1457, 1465-1467 (9th Cir. 1983)), none of the cases cited by petitioner suggests that a cursory check is improper when necessary to assure the safety of the officers executing the warrant. To the contrary, several of those decisions expressly recognize that protective sweeps are warranted in such circumstances. See, *e.g.*, *United States* v. *Kolodziej*, 706 F.2d 590, 596 (5th Cir. 1983); *Spetz*, 721 F.2d at 1465.

Finally, petitioner's factual challenges to the adequacy of the February 21 warrant (Pet. 15-18) are without merit. Given the observations of the agents on February 20, as well as the strong smell of ether in and near the mobile home, petitioner's suggestion that the warrant lacked probable cause is frivolous.[3] And petitioner's contention that the agents conducted a general search of the mobile home is

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[3]As noted above, the protective search of the mobile home on February 20 was reasonable; observations made by the agents in conducting that search accordingly could be used in obtaining the February 21 warrant.

belied by the record. The warrant authorized a search for phencylidine or cocaine, "lab apparatus," "all chemicals and/or agents," other controlled substances, and all documents relating to the laboratory (Pet. App. C17). Those were precisely the items searched for and seized.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

Supreme Court, U.S.
FILED
SEP 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-2145

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THOMAS ANTHONY MARICLE, Petitioner

v.

UNITED STATES OF AMERICA

REPLY TO MEMORANDUM FOR THE

UNITED STATES IN OPPOSITION

STUART I. HYMAN
NeJame & Hyman, P.A.
1520 East Amelia Street
Orlando, Florida 32803
(305) 896-0536

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With regard to Point B of the Petition for Writ of Certiorari, the Petitioner would stand upon the cases cited for the proposition that a Protective Sweep Search was unwarranted in the instant case. Agent Stevens, in his surveillance of the property never obtained any license tag numbers and as such, did not know if the vehicles belonged to the same person.(1 Tr. 38.) He stayed in the area for only thirty (30) minutes and saw no one on the premises.(1 Tr. 38,) 40. He also saw no evidence that the vehicles were operable. (1 Tr. 38.) At the time of his observations, he had received no other information of more than one person being on the premises. (1 Tr. 38.) Two women in a pickup truck confirmed that only one man named Tom lived on the premises.(1 Tr. 39.)

Even though the juveniles had told the Officers about guns being in a shed on the premises, the Officers had no knowledge of

guns being located in the mobile home itself (1 Tr. 41, 54). They also had no information that the individual, Tom, who supposedly occupied the premises, possessed guns nor did they have any information concerning associates of his who might possess guns. (1 Tr. 42, 43). In addition, Agent Stevens had not seen any indications of criminal activity on the premises.(1 Tr. 44.) The only information provided by the juveniles that could be corrorborated would be the location of the premises. (1 Tr. 44, 45). Both Investigator Jenkins and Agent Stevens admitted that they had merely a suspicion that others were on the premises but that there was not a probability of others being on the premises. (1 Tr. 60, 157). Agent Stevens went so far as to testify that he had no hard, concrete facts that others were in the mobile home at the time of the execution of the February 20, 1985 Search Warrant. (1 Tr. 60).

Investigator Jenkins stated that he had no information that the occupants of the premises were armed or dangerous. (1 Tr. 158).

The government also attempts to sustain the search of the mobile home in the instant case based upon the odor of ether. Prior to their application for the Search Warrant of February 20, 1985, the Agents had been aware for at least nine (9) hours that there was potentially an odor of ether present at the mobile home. In fact, the two (2) juveniles had told them about the ether in their statements. (1 Tr. 52, Pet. App. B-15-22). Once again, the police created their own exigent circumstances by not making application for a Search Warrant for the mobile home in order to obtain judicial approval to investigate the odor of ether.

The government's argument that the public's safety was in danger also holds no water in that the premises were under

observation by the police from 6:00 A.M. until the execution of the Search Warrant at approximately 2:30 P.M. and there was no explosion (1 Tr. 51). In addition, the so called ether danger had been present since February 7, 1985, the date the juveniles allegedly broke into the trailer and smelled ether and yet there was still no explosion. Finally, in this alleged dangerous situation, the police took the time to have a S.W.A.T Team briefing session before the execution of the February 20, 1985 Warrant. (1 Tr. 155). It would be submitted by the Petitioner that the alleged immediacy of the situation upon which the police allegedly acted was more an act of speculation and smoke screen than fact.

The alleged need to turn the electricity off in the lab for safety's sake is directly refuted by the fact that the chemist brought in by the Drug Enforcement Administration, Harold Hannel, determined

that there was no danger and in fact, had the electricity turned back on. (1 Tr. 114). It should also be pointed out that the Agents' decision to enter the mobile home, in order to protect the public safety, was made only after the initial illegal entry into the trailer by the S.W.A.T. Team under the auspices of a Protective Sweep Search and was thus, "fruit of the poisounous tree". (2 Tr. 10). In United States v. Impink, 728 Fed.2d. 1228, (9th Cir. 1984), the Court stated on Page 1231

> "To hold that the mere presence of flasks and beakers consitutes an exigent circumstance would be to hold every chemical laboratory in the country open to warrantless searches. We have declined to do this before. See United States v. Crozier, 674 Fed.2d. 1293, 1298-99 (9th Cir. 1982) and we decline to do so now."

In the instant case, the police had no indication at the time they initially approached the mobile home that there was a

functional illegal labratory present therein. At best, the police after the entry into the mobile home, smelled the odor of a legal chemical, ether. As such, there existed no exigent circumstances to enter the mobile home. See United States v. Tate, 694 Fed.2d. 1217, (9th Cir. 1982).

Therefore, the entry into the mobile home, which was not authorized in the February 20, 1985 Search Warrant cannot be legally sustained. This is especially so in light of the fact that the only gun alleged to have ever been in the mobile home was removed by the juveniles themselves before the issuance of the Search Warrants. (Pet. App. C-23).

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